Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AMC NETWORKS INC.,	)	File No. CSR-__________-P
Complainant,	)	
	)	
v.	)	
	)	
AT&T INC.,	)	
Defendant.	)	

PETITION OF AMC NETWORKS INC. FOR TEMPORARY RELIEF PENDING RESOLUTION OF PROGRAM CARRIAGE COMPLAINT

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TO: Chief, Media Bureau

PETITION OF AMC NETWORKS INC. FOR TEMPORARY RELIEF PENDING RESOLUTION OF PROGRAM CARRIAGE COMPLAINT

Pursuant to section 4(i) of the Communications Act, 47 U.S.C. 154(i), and section 76.7 of the Commission's rules, 47 C.F.R. 76.7, AMC Networks Inc. ("AMCN") respectfully petitions that the Commission order a standstill of the AT&T AMCN Agreement[1/] during the pendency of AMCN's program carriage complaint, filed concurrently today with the Commission. The AT&T AMCN Agreement is set to expire {{[redacted]}}, and in the absence of a

[1/] As defined herein for purposes of this Petition, the "AT&T AMCN Agreement" includes the {{[redacted]}}.

standstill, AMCN will be forced into a Hobson's choice: either (i) pulling its networks off one of the biggest distributors in the country, causing an immediate loss of millions of subscribers and the attendant loss of license fees and advertising revenues, or (ii) agreeing to AT&T's discriminatory and drastic {{[redacted]}}, the effects of which are magnified by AT&T's simultaneous demand to {{[redacted]}}, <u>and</u> AT&T's demand that {{[redacted]}}.[2/]

Acceding to these unlawful demands would severely impact AMC and AMC+'s ability to compete fairly, because it would both cause the networks to {{[redacted]}}.

A standstill of the terms on which AT&T currently carries AMC will protect not only AMC and AT&T's approximately **{{**[redacted]**}}** AMC subscribers, but also the approximately **{{**[redacted]**}}** consumers that receive AMC and AMC+ programming today from all distribution

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[2/] Specifically, AT&T is requiring AMCN to agree that {{[redacted]}} Following AMCN's notice of its intent to file this Complaint, AT&T {{[redacted]}}.

platforms, who currently enjoy the value of independent, innovative, award-winning programming services on their channel line-up and could receive a diminished service if AMC and AMC+ do not receive fair license fees from AT&T. Protecting AMC, AMC+, AT&T subscribers, and all members of the public who appreciate the value of diverse programming from irreparable harm while the Complaint is pending before the Commission would effectuate the protections for competition and diversity embodied in Section 616.

I. THE COMMISSION HAS AUTHORITY TO GRANT THE STANDSTILL

The Media Bureau has made clear that regardless of whether it has specific rules in effect providing for program carriage standstill orders, the Commission "has statutory authority to act on [a] petition for interim relief pursuant to the authority granted to the Commission under Section 4(i) of the Act,"[3/] and the Media Bureau "has delegated authority to resolve a petition for interim relief under Sections 0.61 and 0.283 of the Commission's rules."[4/] While the Bureau in the past has cautioned that a standstill can only preserve, not alter, the status quo, that concern is not implicated here, because AMCN brings this petition well before the expiration of the AT&T AMCN Agreement and so seeks to preserve the status quo. The Bureau thus has full authority to issue the requested standstill.

3/ *Game Show Network LLC v. Cablevision Systems Corp.*, Order, 26 FCC Rcd 16471, n.32 (2011), citing 47 U.S.C. § 154(i) (stating that the Commission "may perform any and all acts . . . and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions") ("*Game Show Network Order*"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508, ¶¶ 13, n.41, 32 (1998); *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22566, ¶ 159 & n.464 (1997); *Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016, ¶¶ 34, n.64, 39 (MB 2006); *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, ¶ 6, n.31 (MB 2010).

4/ *Game Show Network Order* ¶ 10, n.32.

II. TEMPORARY RELIEF IS NECESSARY TO PREVENT IRREPARABLE HARM TO AMC AND AMC+

The Commission evaluates a request for interim relief on four criteria: (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) whether the preliminary relief will further the public interest.[5/] All four of those criteria are satisfied here.

A. AMCN Has A Likelihood of Success on the Merits.

To demonstrate a prima facie case of discrimination, AMCN must establish evidence that (1) its unaffiliated networks are "similarly situated" with one or more AT&T-affiliated networks; (2) AT&T treated the similarly situated networks differently because of their affiliation; and (3) the differential treatment unreasonably harmed the unaffiliated networks' ability to compete.[6/] The Complaint establishes all three of these elements, which are described here in summary terms.

1. AMCN's networks AMC and AMC+ are similarly situated to AT&T's networks HBO and TNT.

Evidence that a complainant's programming network is similarly situated to a programming network affiliated with the defendant MVPD can be "based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors."[7/] The Media Bureau will "assess on a case-by-case basis whether the complaint contains evidence to establish at the *prima facie* stage that the affiliated

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5/ *See Washington Metropolitan Area Transit Commission v. Holiday Tours. Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

6/ 47 C.F.R. § 76.1301(c); *Revision of the Commission's Program Carriage Rules, Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCC Rcd 11494, ¶ 14 (2011) ("*Second Report and Order*").

7/ *Id.*

and unaffiliated video programming is similarly situated."[8/] Under these standards, AMC and AMC+ are both similarly situated to HBO, and AMC is additionally similarly situated to TNT. The evidence described in the Complaint[9/] includes that:

- AT&T named AMC as one of HBO's top competitors in its Proposed Findings of Fact filed in its litigation with the Department of Justice regarding the AT&T/Time Warner Inc. merger;[10/]

- AMC and HBO both share the predominant genre of premium, scripted, original dramas.[11/] Both networks are regular competitors in this genre at the Emmy Awards, with each network having at least one nominee for Outstanding Drama Series in five of the six years, including in 2020.[12/] Moreover, in 2020, two actors/actresses on AMC shows and three actors/actresses on HBO shows have been nominated for Outstanding Lead Actor/Actress in a Drama Series, accounting for nearly half of all nominations in this category (5 out of 12). AMC+ airs shows in the same genre as AMC, offering AMC's top-rated dramas, among other top-rated programming. [13/] TNT also regularly airs shows that fall within the same high-end, scripted, original drama genre as the shows aired by AMC, AMC+, and HBO.[14/]

- AMC and HBO regularly compete against each other to acquire the same types of programing, namely high-end, scripted, original dramas. AMC has regularly marketed itself as "Premium Television on Basic Cable." There are numerous examples of programming that was originally submitted to AMC over the last four years but ultimately aired on HBO, reflecting the similarity in the two networks' targeted programming. There also is significant fluidity between HBO and AMC with respect to talent, producers, and writers. TNT likewise has publicly stated that its focus on original programming is on "broad-appeal dramas" and "edgy drama series." A highly rated drama, *Snowpiercer*, recently was moved from TBS to TNT because it is a better fit for the type of programming that TNT seeks to acquire.[15/]

8/ *Id.*, n.57.

9/ *See* Complaint ¶¶ 46-76 for the full discussion of how the networks are similarly situated.

10/ AT&T Proposed Findings of Fact, *United States. v. AT&T, et al.*, Case No. 1:17-cv-02511-RJL, at ¶ 297 (filed May 3, 2018), **Ex. E** to the Complaint**.**

11/ Complaint ¶¶ 47-53.

12/ *Id.* ¶¶ 50-51.

13/ *Id.* ¶ 23.

14/ *Id.* ¶ 53.

15/ *Id.* ¶¶ 53-60.

- AMC, AMC+, HBO, and TNT all target the same type of audience, primarily men and women in the 18-49 and 25-54 demographics, with a focus on viewers who will become heavily engaged in and become massive followers of the programming that they consume.[16/] Both AMC's *The Walking Dead a*nd HBO's *Game of Thrones* attract this type of devoted audience following.[17/] AMC's marketing materials emphasize that its targeted audience includes "gurus" and "super fans" of fantasy and post-apocalyptic content.[18/] Likewise, HBO's executives have emphasized the importance of attracting the types of viewers who engage actively with the programming content.[19/]

- AMC and TNT are similar with respect to their targeted advertising. A survey commissioned by AMCN in 2019 contacted people who actively make decisions about media brand selection and found that AMC and TNT are viewed similarly by advertisers with respect to many critical advertising metrics. And while HBO does not offer advertising, AMC references HBO in its own pitches to advertisers because the networks are so similar: AMC tells advertisers that AMC is the "most premium advertising environment on television" and that, unlike HBO, "you can build your brand in our premium environment."[20/]

- AMC's ratings are similar to HBO's and TNT's ratings in critical ways. For example, {{[redacted]}}[21/]

- AMC regularly tracks and features TNT and HBO in its internal competitive reports as among the similar networks in its competitive set.[22/]

2. AT&T is treating AMC and AMC+ differently from HBO and TNT due to their non-affiliation.

AT&T treats its own networks very differently from how it is attempting to treat AMC and AMC+. AT&T funds its networks fully and demands that other distributors do the same.

16/ *Id.* ¶¶ 61-62.

17/ *Id.* ¶ 69.

18/ *Id.* ¶¶ 61-62.

19/ *Id.* ¶ 62.

20/ *Id.* ¶¶ 63-68.

21/ *Id.* ¶ 70.

22/ *Id.* ¶ 76.

While it is attempting to {{[redacted]}}, AT&T is simultaneously increasing the funds available to its own networks. AT&T has been pouring money into HBO's programming content, and recently made it extremely clear that, far from reducing its networks' budgets, it is substantially increasing them, so that they can compete fully in the ongoing war for content.

In 2019 alone, AT&T spent a whopping $14.2 billion on original content, and HBO "expanded its production of original content by 50%, to 150 hours,"[23/] to the tune of "about $1.5 billion."[24/] A year earlier, "HBO spent roughly $2.2 billion on content . . . , and their 137 [Emmy] nominations cost the network just under $16 million each."[25/] Reportedly, $500 million was just added 'to HBO's existing $2 billion to $2.5 billion annual content spend.'"[26/]

AT&T also seeks to treat AMC differently from the revenue terms it accepts for its own affiliated networks from other MVPDs. AT&T's 2020 10-K notes that both HBO and TNT's "license agreements with its distributors are typically multi-year arrangements that provide for

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23/ *See* Gavin Bridge, *Entertainment Companies Spend $121 Billion on Original Content in 2019*, VARIETY (Jan. 6, 2020), https://variety.com/2020/biz/news/2019-original-content-spend-121-billion-1203457940/ (also noting that, to "maintain its market share, Netflix increased their content spend by $3 billion as the streamer increased its content volume by over 50% versus 2018").

24/ *See* Adam Levy, *Will HBO Max Grow Into Its Content Budget?*, THE MOTLEY FOOL (July 22, 2020), https://www.fool.com/investing/2019/10/24/will-hbo-max-grow-into-its-content-budget.aspx.

25/ *See* Helen Back, *Here's How Much Netflix, Hulu, Amazon, and HBO Spent Per Emmy Nomination*, KILL THE CABLE BILL, (July 29, 2019) https://www.killthecablebill.com/cost-per-emmy-nomination/; *see also* Timothy Green, *You Won't Believe How Much Netflix Spent on Each Emmy Nomination*, THE MOTLEY FOOL (Sept. 1, 2018) https://www.fool.com/investing/2018/09/01/you-wont-believe-how-much-netflix-spent-on-each-em.aspx ("[E]ach of HBO's 108 Emmy nominations cost the network just $23 million in terms of content spending."); Adam Epstein, *HBO's "Watchmen" is weird and dangerous, just like it needs to be*, QUARTZ (Oct. 17, 2019) https://qz.com/1729339/hbos-big-watchmen-risk-totally-pays-off/) (noting that the show *Watchmen* "cost HBO about $15 million per episode").

26/ *See id.*; *see also* Brandon Katz, *WarnerMedia to Add an Extra $500 Million to HBO's Budget*, OBSERVER (July 30, 2019) https://observer.com/2019/07/hbo-budget-warnermedia-invest-extra-500-million/ ("WarnerMedia is set to increase HBO's programming budget—currently $2.5 billion per year—by an additional $500 million for 2019 and 2020.").

annual service fee increases."[27/]

AT&T also does not subject its own networks to the {{[redacted]}}. At the same time AT&T seeks to {{[redacted]}}, it allows HBO and TNT content – often, current season content – to be carried on a wide variety of OVD and other broadband platforms. For example, HBO is carried on Hulu[28/] and Amazon Prime[29/] and TNT content is carried on Amazon Prime.[30/] Moreover, AT&T has explained at length that it understands the importance of a programming network being on online platforms.[31/]

AT&T's explanations for the terms it has offered do not hold up to scrutiny. First, it has argued that {{[redacted]}} None of these explanations withstands closer examination.

With regard to the amount it pays in license fees, as explained above, AT&T has been extremely public about the fact that it is paying HBO substantially more this year. AT&T also announced in 2020 that, because its "programming costs went up," it had "to raise our monthly

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27/ AT&T Inc., Annual Report (Form 10-K) (Feb. 20, 2020), at 7 ("AT&T 2020 10-K").

28/ *See* HBO on Hulu, https://www.hulu.com/hboclassic (last visited July 30, 2020).

29/ *See* How to add HBO as a Prime Video Channel, https://help.hbonow.com/Answer/Detail/235 (last visited July 30, 2020).

30/ *See* Watch TNT on Amazon Prime, https://www.amazon.com/Turner-Entertainment-Networks-Watch-TNT/dp/B00BI583GE (last visited July 30, 2020).

31/ *See* Complaint ¶ 82.

prices for select packages."[32/] Indeed, AT&T has noted repeatedly that it is paying more for programming in 2020, using that excuse as a reason to institute a price increase for subscribers.[33/] Therefore, the suggestion that {{[redacted]}} does not hold water.

While AT&T may be attempting to {{[redacted]}}, it would not make good business sense absent a discriminatory motive {{[redacted]}}. To the contrary, in the absence of owning competitive affiliated networks, AT&T would be motivated to help AMC and AMC+ succeed and would price the networks appropriately, because of the immense value they contribute to the AT&T channel line-up.[34/] MVPDs frequently acknowledge that the value of their service offering and their ability to attract and retain customers depends on their ability to offer the most popular programming to customers.[35/] When engaging in cost-cutting, therefore, MVPDs generally

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[32/] *See* Jon Brodkin, *AT&T Raises DirecTV Prices Again Despite Losing Millions of Customers*, ARS TECHNICA (Dec. 10, 2019*)* https://arstechnica.com/information-technology/2019/12/att-raises-directv-prices-again-despite-losing-millions-of-customers/; *see also* Mae Abdulbaki, *DirecTV Is Raising Prices Again After Already Losing Customers in Droves*, CINEMABLEND (Dec. 12, 2019) https://www.cinemablend.com/television/2486622/directv-is-raising-prices-again-after-already-losing-customers-in-droves (DIRECTV explaining that because "our programming costs went up, we have to raise our monthly prices for select packages.").

[33/] Dade Hayes, *AT&T Sets DirecTV and U-Verse Price Hikes In 2020, Citing Higher Program Costs*, DEADLINE (Dec. 9, 2019) https://deadline.com/2019/12/att-sets-directv-and-u-verse-price-hikes-in-2020-citing-higher-program-costs-1202804956/.

[34/] Indeed, as discussed below, AT&T claims that {{[redacted]}}

[35/] *See*, *e.g.*, AT&T 2020 10-K at 5; Altice U.S.A, Inc., Annual Report (Form 10-K) (Feb. 14, 2020), at 21 ("Disputes with programmers and the inability to retain or obtain popular programming can adversely affect our relationship with customers and lead to customer losses, which could materially adversely affect our business, financial condition and results of operations."); Charter Communications, Annual Report (Form 10-K) (Feb. 7, 2020), at 16 ("Our failure to carry programming that is attractive to our customers could adversely impact our customer levels, operations and financial results."); DISH Network Corporation, Annual Report (Form 10-K) (Feb. 19, 2020), at 30, 71 ("Our ability to compete target the lesser-known and lesser-watched networks, not the most highly-valued networks on which they depend to attract subscribers.[36/]

AMCN operates several of the most popular household name-brand programming networks today. AMC consistently ranks high on the list of programming networks that viewers consider to be "must have" and its viewers are considered to be "superfans," the most loyal viewers a network can win. Among other things,[37/] AMC:

- Had an Outstanding Drama Series Emmy nomination for 9 of 10 years this decade and won 4 of them."[38/] Its shows also regularly have been nominated for and won Screen Actors Guild Awards and all other prestigious awards in the television industry.[39/]

- Ranked number {{[redacted]}} in the advertiser-coveted Adult 25-54 demographic for viewership of original programming in 2019 during Primetime hours among all cable networks.[40/]

- Airs *The Walking Dead*, a {{[redacted]}}[41/] *The Walking Dead* also {{[redacted]}}.

- Ranked as a "must have" network among total women in the publicly reported results of the 2019 Beta Basic Network Evaluation Study.[43/] When adults were

successfully will depend, among other things, on our ability to continue to obtain desirable programming").

36/ *See, e.g.*, *Game Show Network v. Cablevision Systems Corp.*, Answer to Program Carriage Complaint (filed Dec. 12, 2011) at 53-55 (noting that "customer satisfaction, acquisition, and retention … are primary MVPD concerns in licensing a network because those factors drive subscription revenue").

37/ *See* Complaint ¶¶ 81-102, for the full discussion of how stifling AMC's growth works against the business interests of a distributor.

38/ *See id.* ¶ 91.

39/ *Id.*

40/ *See* **Ex. W** to Complaint.

41/ *See* {{[redacted]}}, **Ex. II** to Complaint**.**

42/ *See* {{[redacted]}}, **Ex. GG** to Complaint**.**

43/ *See 09/19/19: Escape rebrands to Court TV Mystery*, CYNOPSISMEDIA, https://www.cynopsis.com/09-19-19-escape-rebrands-to-court-tv-

> asked for which networks they "would definitely switch their cable provider if it was dropped from their channel lineup," AMC made the short list.[44/]

AMC is therefore, unsurprisingly, carried by all major MVPDs on their most widely distributed tier and paid carriage fees that reflect its popularity and the value that AMC contributes to the MVPD offering.

AMCN recently launched a new linear programming network, AMC+.[45/] AMC+ is an ad-free, premium linear programming network that is presently offered *a la carte*, along with complementary on demand content, to video and broadband subscribers of Comcast, DISH, and SlingTV.[46/] The content offered on AMC+ includes selections from AMC's premier original programming as well as top titles from AMCN's other networks and products, such as IFC Films Unlimited, Sundance and Shudder.[47/] AMCN is deep in negotiations to launch AMC+ on a number of other MVPDs and online distributors.

AT&T's attempt to impose the {{[redacted]}} makes no economic sense apart from a discriminatory motive. While there was a time while online video competition was developing that MVPDs commonly attempted to prevent programmers from

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mystery/#:~:text=According%20to%20the%202019%20Beta,%25)%20and%20ESPN2%20(35%25). (last visited August 1, 2020).

44/ *See id.*; *see also* Michael Balderston, *ESPN Most Valued Network Among Viewers, Per Beta Research*, TV TECHNOLOGY, https://www.tvtechnology.com/news/espn-most-valued-network-among-viewers-per-beta-research (Sept. 19, 2019) ("Beta Research conducted its survey with a national sample of 1,400 cable subscribers age 18 and older, using three questions to measure 45 basic cable networks.").

45/ Press Release, AMC Networks, AMC Networks Offers New Subscription Video on Demand Bundles to Comcast's XFINITY Customers, (June 10, 2020), https://www.amcnetworks.com/press-releases/amc-networks-offers-new-subscription-video-on-demand-bundles-to-comcasts-xfinity-customers/.

46/ *Discover AMC+*, https://www.xfinity.com/learn/digital-cable-tv/svod/amc-plus; *Watch AMC+ Online,* https://www.sling.com/channels/amc-plus; *Discover AMC+,* https://my.dish.com/subscription-on-demand/amcplus.

47/ *See id*.

agreeing to make their content available online, other MVPDs abandoned such behavior when the Commission and the Department of Justice made quite clear that such behavior is anticompetitive.[48/]

Today, while MVPDs commonly ask programmers to refrain from making popular content available on the Internet for free, they do not seek to bar programmers from being part of online offerings, recognizing, as AT&T has elsewhere and for its own networks,[49/] that programmers need to have the ability to be on those platforms to remain funded, competitive and relevant.[50/] Other MVPDs have not imposed the restrictions that AT&T seeks to impose via {{[redacted]}}. In seeking {{[redacted]}} in today's vastly changed video landscape, AT&T is acting completely against marketplace trends—in a way that would {{[redacted]}}.

Given everything that AMC and AMC+ have to offer to AT&T and to its viewers, any reasonable MVPD would do everything possible to enable AMC to continue to attract new viewers and to produce new and excellent content. In the absence of anticompetitive intent, it

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48/ *See, e.g.*, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Order, 26 FCC Rcd 4238, ¶ 73 (2011) ("demand of restrictive online rights in exchange for carriage may also cause harms to consumer choice, diversity, and broadband investment").

49/ Complaint ¶ 99.

50/ *See* Cynthia Littleton and Brett Lang, *Inside CEO John Stankey's 'Action-Oriented' Approach to Reposition WarnerMedia*, VARIETY (July 30, 2019) https://variety.com/2019/biz/features/john-stankey-warnermedia-ceo-hbo-warner-bros-1203281473/ ("'If you're going to be relevant in entertainment distribution moving forward, you're going to have to have a scaled product that gets into the most households,' Stankey says.").

would make no business or economic sense whatsoever to cut off the lifeline of the network by {{[redacted]}}.[51/]

It makes no business sense for AT&T to hinder the development of networks on which it depends to attract and retain subscribers, unless AT&T's actions are designed and intended to give its affiliated networks a substantial competitive edge in the marketplace. While citing {{[redacted]}}, AT&T is heavily funding its own networks. While citing {{[redacted]}}, AT&T is allowing its own networks to distribute as broadly as possible. This disparate treatment will benefit HBO and TNT tremendously – in terms of less competition for content (driving prices down), less competition for viewers, and a greater opportunity to gain substantial early leverage in the online video marketplace. Making carriage decisions based on these financial incentives is precisely the kind of behavior proscribed by Section 616.

3. AT&T's discriminatory behavior will unreasonably harm AMC and AMC+'s ability to compete.

A programming network depends on license fees to acquire content and carry out its day-to-day business activities – even more so now, as advertising dollars have dropped off due to COVID-19.[52/] Programmers further depend on the ability to distribute their networks as broadly as possible, both to gain additional license fees, and to attract a new audience and maintain their

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[51/] Moreover, examination of AT&T's asserted rationales reveals an inconsistency that betrays the credibility of their argument: if AT&T believes that {{[redacted]}} then it must recognize that value when negotiating license fees for linear carriage.

[52/] Megan Graham, *Media Companies Expect a Tough Quarter for TV Advertising, with No Live Sports and Spending Delayed*, CNBC (May 8, 2020), https://www.cnbc.com/2020/05/08/tv-advertising-bracing-for-tough-quarter-amid-coronavirus-pandemic.html.

brand and reputation. For all of the reasons discussed below that failure to stop AT&T's discriminatory behavior would cause AMC and AMC+ irreparable harm,[53/] and as elaborated on in the Complaint,[54/] AT&T's actions would also substantially harm AMC and AMC+'s ability to compete in the marketplace.

B. AMC and AMC+ Will Suffer Irreparable Harm Absent a Grant of Temporary Relief.

AT&T has presented AMCN with a Hobson's choice. AT&T's conditions of carriage – {{[redacted]}} – could easily shut down those networks' ability to compete fairly in the marketplace. Yet given AT&T's size and command over many millions of viewers – nearly a quarter of AMC's total subscribers – so would a decision not to renew the affiliation agreement.[55/] Only by granting AMCN's request for temporary relief can this irreparable harm be avoided.

First, a {{[redacted]}} from one of its largest distributors could have immediate and severe repercussions on AMC's ability to compete in the television marketplace far into the future.[56/] AMC relies on a steady flow of license fee-based income in

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53/ *See infra*, pp. 16-18.

54/ *See* Complaint ¶ 12.

55/ This is particularly true because the AT&T AMCN Agreement {{[redacted]}}.

56/ In addition, the revenue loss from this new agreement would be even greater, since AT&T insists on {{[redacted]}}.

order to compete for and produce the top content that defines the network, the rights to which are often secured months before airing – as AT&T is well aware, since it does the same.[57/]

Moreover, securing the rights to a top show when it becomes available not only results in the rights to that content, but often leads to spin-off shows, associated content, merchandising, and other opportunities that provide an income flow for many years.[58/] If AMC cannot bid today on the programs that it believes would best keep the network popular and valuable, because it is not assured of the necessary income stream from license fees, the repercussions of that lack of funding could last far into the future and cannot be remedied even if AMCN succeeds in winning its program carriage complaint and recovers the lost license fees for AMC.[59/] This, alone,

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57/ *See* AT&T 2020 10-K at 19 ("We must continually add new subscribers both to replace canceled subscribers and to grow our business. If we do not grow as expected, given, in particular, that a significant portion of our content costs are committed and contracted over several years based on minimum subscriber delivery levels, we may not be able to adjust our expenditures or increase our (per subscriber) revenues commensurate with the lowered growth rate such that our margins, liquidity and results of operations may be adversely impacted.").

58/ AT&T, in fact, touts this as one way of making programming more valuable, saying "Our television programming also supports Warner Bros.' key brands and franchises, which helps generate consumer product and brand licensing revenues based on the programming for years beyond the initial airing of the programming on television." AT&T 2020 10-K at 8.

59/ It is widely recognized that networks like AMC, which define themselves by offering high end scripted drama, face growing pressure to procure new and exciting content to compete with streaming services that are seeking to distinguish themselves by spending more on content. The "streaming industry requires unfathomable investments" and there "will be upwards of $35 billion spent on content across the board" in 2020 alone. *See* Brandon Katz, *How Much Does It Cost to Fight in the Streaming Wars?*, OBSERVER (Oct. 23, 2019) https://observer.com/2019/10/netflix-disney-apple-amazon-hbo-max-peacock-content-budgets/ (noting that $500 million was just added 'to HBO's existing $2 billion to $2.5 billion annual content spend'" and its new platform is expected to launch "upwards of 10,000 hours of programming."); *see also* Levy, *supra* n.24 (noting that AT&T "is pouring a lot of money into content" generally, and it further "committed to increasing HBO's original productions budget by 50% to about $1.5 billion" in 2020, and that Netflix, likewise, "increased their content spend by $3 billion as the streamer increased its content volume by over 50% versus 2018."); Bridge, *supra* n.23 (stating that U.S, media and entertainment companies "spent over $120 billion on original content" in 2019, which is a "whopping sum fueled by the increasing investment of players including AT&T's HBO, which expanded its production of original content by 50%, to 150 hours;" and that Netflix, likewise, "increased their content spend by $3 billion as the streamer increased its content volume by over 50% versus 2018.").

represents significant, immediate, and irreparable harm to AMC meriting a standstill.[60/]

Second, in addition to the direct loss of funds for content, {{[redacted]}} This type of reputational and customer loss has long been recognized to be irreparable.[61/]

Third, AT&T's insistence on {{[redacted]}} will magnify the effects of the {{[redacted]}}, because AMC and AMC+ will be unable to {{[redacted]}}. And even if AMCN wins its program carriage complaint, AMC will not {{[redacted]}}.

Finally, if AMCN is forced to {{[redacted]

60/ *See Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1304, 131 S. Ct. 1, 4 (2010) (internal citations omitted) ("As for irreparable harm: Normally the mere payment of money is not considered irreparable, but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable.).

61/ *See, e.g.*, *Register.com, Inc. v. Verio Inc.*, 356 F.3d 393, 404 (2d Cir. 2004) ("[I]rreparable harm may be found [and] injunctive relief is appropriate where it would be 'very difficult to calculate monetary damages that would successfully redress the loss of a relationship with a client that would produce an indeterminate amount of business in years to come.'") (quoting *Ticor Title Ins. Co. v. Cohen,* 173 F.3d 63, 69 (2d Cir. 1999)); *Register.com, Inc.*, 356 F.3d at 404 (affirming district court finding that "loss of reputation, good will, and business opportunities" constituted irreparable harm); *Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 445 (2d Cir. 1977) ("threatened loss of good will and customers" cannot be compensated monetarily).

[redacted]}} for the duration of the program carriage proceeding – a proceeding that often takes many months or even years to resolve – {{[redacted]}}. Programming networks need to be perceived as current and keeping up with the times to be able to attract and retain viewers. Today's viewers watch video on a wide variety of platforms, and they expect the leading networks to be part of those platforms' service offerings. A network's {{[redacted]}} Each of these harms is irreparable.[62/]

C. Grant of the Petition Will Not Irreparably Harm AT&T.

Grant of this petition will simply preserve the *status quo*. If the Commission grants AMCN this requested temporary relief, AT&T will continue to carry AMC on nondiscriminatory

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[62/] Inability to calculate damages, harm to goodwill, diminishment of competitive positions in marketplace, and lost opportunities to distribute unique products all constitute irreparable harm. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 356 F.3d 1256, 1263-64 (10th Cir. 2004), citing *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37-39 (2d Cir. 1995) (loss of prospective goodwill through inability to market unique product constituted irreparable harm); *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992) (finding irreparable harm where damages were difficult to calculate, customer goodwill was damaged, and plaintiff suffered loss of competitive position); *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 592 (8th Cir. 1984) (breach of exclusive distribution agreement constituted irreparable harm where company was disadvantaged in competitive market by inability to market unique product); *Green Stripe, Inc. v. Berny's Internacionale, S.A.*, 159 F. Supp. 2d 51, 56-57 (E.D. Pa. 2001) (finding irreparable harm where plaintiff was denied ability to sell product required to maintain its presence in market); *Walgreen Co. v. Sara Creek Prop. Co.*, 775 F. Supp. 1192, 1197 (E.D. Wisc. 1991) (where exclusivity clause in lease was breached, loss of goodwill, erosion of customer base, and diminution of corporate image provided grounds for finding irreparable harm), *aff'd*, 966 F.2d 273 (7th Cir. 1992); *Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498 (10th Cir. 1993) (loss of uniqueness in marketplace satisfied irreparable harm factor where plaintiff established harm to goodwill and difficulty in calculating damages); *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907-09 (2d Cir. 1990) (loss of unique product and goodwill supports finding of irreparable harm when customers indicate a strong preference for the product and threaten discontinuation of business relationship).

rates, terms and conditions for a slightly longer period of time. Having already operated on these terms for years, AT&T will not be harmed by paying license fees at the same rate for a few more months.

With regard to using its size to try to {{[redacted]}}, AT&T cannot plausibly defend this ask as consistent with fair and reasonable competition. In drafting the program carriage law, Congress specifically barred distributors such as AT&T from "coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system."[63/] While this provision was enacted well before the emergence of online video, the spirit and intent behind the prohibition is clearly that distributors are not meant to try to stifle carriage of programming by competing services.

Indeed, in the Comcast-NBCU merger proceeding, DIRECTV (now owned by and part of AT&T) argued strongly that the Commission needed to protect against Comcast trying to use its size and strength to force programmers to withhold their services from developing online platforms.[64/] The Commission agreed that this potential behavior was a significant concern, because a large distributor's "demand of restrictive online rights in exchange for carriage may also cause harms to consumer choice, diversity, and broadband investment."[65/] Today, AT&T's attempt to {{[redacted]}} is even more anticompetitive, given how prevalent use of these services has become. Depriving

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63/ 47 U.S.C. § 536(a)(2).

64/ Comments of DIRECTV, Inc., *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, at 35 (filed June 22, 2010).

65/ *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Order, 26 FCC Rcd 4238, ¶ 73 (2011).

AT&T of an opportunity to behave in a discriminatory and anticompetitive way cannot be the basis of a claim of irreparable harm. Accordingly, the harm to AT&T is non-substantial or non-existent, and this factor should weigh in favor of the grant of temporary relief.[66/]

D. Granting Temporary Relief Will Further the Public Interest.

Finally, grant of the requested relief will serve the public interest. Section 616 stems from the long-recognized concern that program carriage discrimination can irreparably harm the public's interest in diversity and quality of video programming.[67/] Federal media policy has long recognized the importance of promoting a diversity of viewpoints, even well before Congress identified the promotion of diversity of views and information as one of the main purposes of the 1992 Cable Act.[68/] As one of the few remaining independent programmers, AMC adds a unique and innovative voice to the channel line-up that should be protected. Further, allowing AMC and AMC+ to add their voices to new developing services and platforms for accessing video

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66/ Even the modest economic cost to AT&T caused by the interim relief could be remedied retroactively if the Commission ultimately finds in AT&T's favor. *Cf. Second Report and Order* ¶ 28 ("If the Media Bureau grants the temporary standstill, the adjudicator ruling on the merits of the complaint . . . will apply the terms of the new agreement between the parties, if any, as of the expiration date of the previous agreement.").

67/ *See* S. Rep. No. 102-92 (1991), at 23, reprinted in 1992 U.S.C.C.A.N. 1133, 1159 ("You don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the disadvantage of those services . . . in which he does not have an equity position."); *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, ¶ 2 (1993).

68/ *See* 47 U.S.C. § 521(4). Congress emphasized this priority throughout the Communications Act. *See, e.g.*, 47 U.S.C. § 257(b) ("[T]he Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices . . . ."). The Commission on numerous occasions has acknowledged the importance of "viewpoint diversity," *see, e.g.*, *Cross-Ownership of Broadcast Stations and Newspapers*, 18 FCC Rcd 13620, ¶ 19 (2003); *A National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd 4342, ¶ 101 (2009) (noting "the policies and purposes of the Act favoring, among other things, a diversity of media voices"). Courts have also found that promoting media diversity is a proper Commission goal and, further, that the Commission is authorized to apply rules promoting source diversity. *See FCC v. NCCB*, 436 U.S. 775, 794 (1978).

content supports the development of a more competitive marketplace for video programming distribution.

In the absence of a standstill order, AMC will be forced to either accept terms that {{[redacted]}}, or to withdraw from carriage on AT&T's video services. Neither result serves the public interest. Indeed, especially during these difficult times of COVID-19-mandated isolation, the public increasingly relies on AMCN's excellent programming content for much needed entertainment. To protect the public, the Commission should refuse to allow AT&T to "disrupt[] the crucial relationship between the content provider and the consumer,"[69/] and grant the requested standstill.

[69/] S. Rep. No. 102-92 (1991), at 20, reprinted in 1992 U.S.C.C.A.N. 1133, 1156.

CONCLUSION

Because each of the four factors that the Commission considers in evaluating requests for emergency relief weighs in favor of granting the requested standstill, AMCN respectfully asks the Bureau to grant its petition for temporary relief and to order AT&T to maintain the carriage rates, terms and conditions of the AT&T AMCN Agreement while this proceeding is pending.

Respectfully submitted,

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August 5, 2020

VERIFICATION

I, Clifford A. Bail, Executive Vice President- Deputy General Counsel, AMC Networks Inc., have read the foregoing Petition of AMC Networks Inc. for Temporary Relief Pending Resolution of Program Carriage Complaint, and hereby declare under penalty of perjury, that the factual information contained herein is true and correct to the best of my knowledge, information and belief.

DocuSigned by:

Cliff Bail

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Clifford A. Bail

CERTIFICATE OF SERVICE

I, Tara M. Corvo, hereby certify that on this 5th day of August, 2020, I caused a true and correct copy of the foregoing Petition for Temporary Relief Pending Resolution of Program Carriage Complaint to be served by first class mail, postage prepaid, and by electronic mail upon:

Bruce Byrd
Senior Vice President and Assistant General Counsel
AT&T Communications
208 S. Akard St.
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/s/ Tara M. Corvo
Tara M. Corvo